IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1836 of 2005
With
SPECIAL CIVIL APPLICATION No. 16432 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ?YES.

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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MAHENDRABHAI KANTILAL DAVE - Petitioner(s)
Versus
MANEKCHOWK CO-OP BANK LTD & 2 - Respondent(s)

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Appearance :
MR BHARAT JANI AND MR.N.R.JOSHI for Petitioner(s) : 1,
MR MIHIR A LAKHIA for Respondent(s) : 1,
MR AD DESAI for Respondent(s) : 2,
MR GM JOSHI for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 12/07/2007
COMMON JUDGMENT

1 Both these petitions have been heard together as the evidence relatable to both the matters is common and the controversy arises out of Summary Lavad Suit No. 1007 of 1999 before the Board of Nominees. The said suit was filed by respondent No.1–Co.operative Bank against both the petitioners who are guarantors in relation to loan availed of by one Milindaben Ashwinkumar Dave, Proprietor, Art Research Communication, Vadodara who was defendant No.1 in the said suit. Vide judgment and award dated 23.10.2002 Board of Nominees decreed the suit directing all the defendants, viz borrower and the petitioner guarantors, to pay a sum of Rs.2,46,215/- along with running interest @ 22.5% on and from 18.8.1999.

2 The petitioner of Special Civil Application No. 1836 of 2005 carried the matter in appeal before the Gujarat State Co.operative Tribunal. The Tribunal dismissed the appeal vide order dated 25.08.2004. The petition against the said order came to be admitted vide order dated 11.2.2005.

3 In so far as the petitioner of Special Civil Application No. 16432 of 2007 is concerned, the matter was carried in appeal before the Tribunal vide Appeal No. 1140 of 2002 which came to be decided vide order dated 10.4.2007 dismissing the appeal.

4 Mr.B.G.Jani, learned Advocate for the petitioner Shri Mahendrabhai Kantilal Dave and Shri N.R.Joshi, learned Advocate for the petitioner Shri Mahendrabhai Revabhai Patel have been heard. It is submitted that the orders of Board of Nominees and the Tribunal are perverse. The principal thrust of the contention is based on plea for discharging the petitioners from the suit, as according to the petitioners, the security which was available with creditor bank had been lost and hence, in terms of provisions of Sections 139 & 141 of the Indian Contract Act, 1872 the petitioners, as sureties, were required to be discharged. It was submitted by Mr.Jani that the Board of Nominees has failed to record a specific finding inspite of there being categorical plea in this regard in the written statement. That in fact, the Board of Nominees had failed to frame an issue in this regard and hence, the order was bad in law. That when the matter was carried in appeal

this aspect of the grievance of the petitioner was specifically raised and pleaded before the Tribunal but the Tribunal has brushed aside the same in a single sentence stating that the Tribunal agrees with the findings recorded by the Board of Nominees. That the Tribunal has failed to give any independent reasoning or record any finding as to why the Tribunal agrees with the Board of Nominees especially when there is no finding by the Board of Nominees on the plea raised by the petitioners.

4.1 Mr.N.R.Joshi, learned Advocate for the other petitioner submitted that once a specific pleading was raised whether an issue was framed or not is not material as laid down by the Apex Court in the case of *Bhagwati Prasad Vs. Chandramaul , AIR 1966 SC 735* and *Swamy Atmananda & Ors Vs. Sri Ramkrishna Tapovanam & Ors, AIR 2005 SC 2392.* It was further submitted that considering the panchnama dated 28.8.1999 of the Court Commissioner which is on record read with the cross examination of the officer of the bank it became apparent that both the Board of Nominees and the Tribunal have failed to appreciate the evidence. That it was an accepted fact that when the Court Commissioner drew the panchnama no goods were found and the statement of the

bank official also reveals that the security in the form of hypothecated goods has been lost by the bank. In support of the proposition that in such circumstances, the surety is required to be discharged reliance has been placed on an unreported decision of this Court dated 15.2.2007 rendered in the case of *Visnagar Nagrik Sahakari Bank Ltd. Vs. Sevantilal Kalidas Darji, Special Civil Application No. 1450 of 1998 with Special Civil Application No. 3558 of 2001* as well as another decision of this Court in the case of *Union Bank of India, Bombay Vs. Suresh Bhailal Mehta and Another, AIR 1997 (Guj) 48*. It was further submitted that this was a case where the orders of the Tribunal and the Board of Nominees suffer from vice of perversity and it is open to this Court in exercise of jurisdiction under Article 226 of the Constitution to overturn such orders after interfering as held by the Apex Court in the case of *Sumathi P.Rai Vs. Isac D'almeida & Ors, (2004) 13 SCC 524*.

5. Having heard the learned Advocates for the petitioners, it is apparent that no interference is called for. Strictly speaking it is not necessary to examine as to whether the order made by the Board of Nominees is correct or not as the said order stands merged with the appellate order made by the Tribunal.

The petitioners having availed of statutory remedy of appeals and the appeals having been decided the order of the subordinate Forum has no independent existence and stands merged in the order made by the Appellate Authority. However, to satisfy the conscience of the Court even the said order made by the Board of Nominees was examined. As can be seen from the order of the Board of Nominees not only has the entire evidence placed before it by both the sides been taken into consideration by the Board of Nominees, but there is a categorical finding that despite adequate and reasonable opportunity having been granted to the defendants to lead evidence the defendants have led no evidence, either documentary or oral and hence the right of leading evidence has been closed. Furthermore, the Board of Nominees has recorded each and every contention raised by the learned Advocate for the petitioners and the contention regarding the petitioners being discharged by virtue of loss of security does not appear in the judgment and order of the Board of Nominees. The contentions that are recorded as raised are that : [i] adequate Court fee stamp has not been used, [ii] the documents of loan transaction do not bear signatures of the guarantors, [iii] the plaintiff bank has failed to establish the loan transaction by the documents produced on record, [iv]

the suit may be rejected considering the case law cited.

6 The Board of Nominees has also referred to the deposition of the bank official and recorded that the plaintiff bank has been able to establish both by way of documentary and oral evidence that the bank had advanced loan to defendant No.1. Thus the Board of Nominees has recorded a categorical finding that the defendants have failed to establish any case which was raised in the pleadings by leading any evidence to the contrary.

7 It is this order which has been confirmed by the Tribunal. The Tribunal has confirmed the aforesaid finding recorded by the Board of Nominees. The Tribunal has specifically recorded that the only issue raised before the Tribunal was as to whether the guarantors are required to be discharged as sureties. The Tribunal states that the Tribunal agrees with the finding recorded by the Board of Nominees. The grievance made on behalf of both the petitioners that there is no finding or issue framed by the Board of Nominees does not bear acceptance for the simple reason that the Board of Nominees has categorically recorded that the defendants have failed to lead evidence and establish the case pleaded by the defendants. It is this finding which has been concurred with by

the Tribunal.

8 In the circumstances, it is not possible to state that any error in law has been committed either by the Board of Nominees or the Tribunal. The petitioners-defendants pleaded a specific case and it was for them to lead evidence and establish their case. In so far as the Tribunal is concerned, once the Tribunal concurs with the finding recorded by the Board of Nominees the Tribunal is not expected to again discuss the entire evidence, the only caveat being, the order of the Tribunal must reflect application of mind which the impugned order shows. It is only when an Appellate Authority wants to depart from the view recorded by the subordinate Forum that the Appellate Authority is required to record specific reasons.

9 In the aforesaid set of circumstances, the position in law is well established that in exercise of powers under Article 226 of the Constitution, the High Court is not required to enter the arena of reappreciation of evidence. Submission on behalf of the petitioners that the Board of Nominees and the Tribunal have failed to appreciate the evidence is, to say the least, an incorrect proposition. Appreciation of evidence does not necessarily mean that the evidence has to be appreciated only

in the manner as canvassed by the petitioners. Only for the purposes of ascertaining whether the evidence has or has not been appreciated by the authority below, the Court has gone through the panchnama and the deposition of the bank official which is available on record. The panchnama records that on the date of panchnama the hypothecated goods were not available. From that it does not flow that the security was lost due to negligence of bank. In so far as the deposition of the bank official is concerned, in the cross-examination dated 25.7.2002, it has been specifically stated that the goods had been inspected and the date of inspection can be stated after verifying the record. There is a categorical statement in the cross-examination that after the loan was advanced on 15.6.1998 the bank has undertaken inspection as required by the rules. These statements have been made in the cross-examination conducted by the learned Advocate for the petitioner Shri Mahednrabhai Revabhai Patel. In cross -examination dated 8.8.2002 conducted by the learned Advocate for the petitioner Shri Mahendrabhai Kantilal Dave it is stated that the report of inspection of hypothecated goods has not been produced, followed by the statement that it is incorrect that the secured goods have been lost in collusion with the borrower. The Bank Officer specifically states that he

had seen the secured goods in the form of computers. He further states in the cross-examination that bank having lost the security defendant No.3 gets discharged from being a surety is incorrect. Thus there is no acceptance by the respondent Bank that goods have been lost due to negligence of the Bank. To the contrary, a specific suggestion in the cross-examination has been categorically denied.

10. If this be the state of the evidence it cannot be stated that the orders made by the Board of Nominees or the Tribunal suffer from any legal infirmity, much less perversity. Unfortunately the petitioners have failed to appreciate the distinction between hypothecation of goods and pledge of goods as understood in commercial law. Hypothecated goods are never under control and supervision of the bank but they are always in possession of the borrower. As against that the pledged goods are always under lock and key and direct control of the bank. Delivery is essential in a pledge. In a hypothecation the borrower retains possession of the goods, while in a pledge the goods are physically or constructively delivered to the creditor bank. If this distinction is borne in mind there is no case made out on behalf of the petitioners for discharging the petitioners. The petitioners have failed to

establish their case.

11. The contention based on either Section 139 of the Contract Act or Section 141 of the Contract Act also does not help the petitioners. Under Section 139 of the Contract Act if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which the creditor is required to do as per duty to the surety, and such act or omission by the creditor results in the surety losing the eventual remedy against the borrower, the surety is discharged. The petitioners have failed to lead any evidence which would show what was the duty of the creditor which the creditor failed to perform, or that the creditor acted in a manner, which resulted in the petitioners losing the eventual remedy against the borrower. Nothing has been brought on record to show what was the eventual remedy that the petitioners had against the borrower so as to have lost such remedy. Section 141 of the Contract Act provides for discharge of a surety to the extent of the value of a security when the creditor loses such security, or without consent of the surety parts with such security. However, as held by the Apex Court in the case of *Industrial Finance Corporation of India Ltd. Vs. Cannanore Spinning And Weaving Mills Ltd. And Ors. (2002) 5 SCC 54*

"32. In reference to the second limb of Section 141, in particular the words "the creditor loses" - Mr. Anand contended that the legislature has been rather candid in not incorporating any reservation or qualification for the word "lose". In continuation thereof, it was submitted that the same would thus include as a matter of fact, both voluntary and involuntary act or acts of the creditor, expression would mean and imply both, and the same is an inescapable conclusion when read in contradistinction with Sections 134 and 139 of the Act. Mr. Sundaram, on the other hand, with equal felicity of expression contended that the words noticed above cannot but mean involvement of some voluntary act of the creditor, as otherwise it loses its efficacy and placed in juxtaposition with the second limb of the section would lead to an utter absurdity. The intent of the law-makers is quite candid and apparent by reason of the particular user of expression, to wit :(i) "or, without the consent of the surety", and (ii) "parts with such security". It has been contended that the true intent of the statute cannot be derived from reading in part only and it is one of the golden rules of statutory interpretation that the statutory provision be read in its entirety rather than a word in isolation of others -

"if creditor loses" has to be attributed a meaning as being stated by Mr.Anand, that is to say without there being any voluntary act on the part of the creditor, it cannot possibly be said to be in unison with the other part of the statute – obviously it shall have to be read as a voluntary act by reason whereof he loses the security and which thus tantamounts to be without the consent of the surety. The expression "or" in between the words "creditor loses" and " without the consent of the surety " and the comma read in its proper sphere after the word "loses" and "surety" stands out to be significant since the same qualifies only the latter part of the second limb, namely, parting with such security. The expression "creditor loses" cannot mean and imply an involuntary act but by reason of an act which is attributable to the creditor. The second alternative, parting with security without the knowledge of the surety is a contra-situation, but affords a meaning to the words used in the first para, to wit, "the creditor loses". Section 141 of the Contract Act would lose its efficacy and the Act would render itself totally nugatory if the meaning is to be attributed in the manner as suggested by Mr.Anand. A definite volition is required to come within the ambit of Section 141. The heading of Section 141 also lends, though not normally

a part of the statutory provision, assistance in interpreting the statutory intent since the heading always serves as a guide to depict the intention".

Here also, the petitioners have failed to establish that there has been some voluntary act on part of the creditor, i.e. the respondent No.1 – Bank which resulted in loss of the hypothecated goods.

12. In the two judgments of this Court cited on behalf of the petitioners there are categorical findings of facts which have been noted by the High Court.

12.1. In the case of *Visnagar Nagrik Sahakari Bank Ltd. Vs. Sevantilal Kalidas Darji* (supra) in paragraph No.4 the Court records as under :

" In the appeal at the instance of the Sureties however, the Cooperative Tribunal was of the opinion that it was negligence on part of the bank which resulted into loss of hypothecated stock and that therefore, the bank cannot recover its dues from the respondent herein". Once gain in paragraph No.7 it has been recorded as under :

"7. xxx xxx xxx The Tribunal gave detailed reasons to come to the conclusion that it was on account of sheer negligence on part of the bank which led to disappearance of the stock. The Tribunal therefore, concluded that the principal debtor was successful in siphoning off the hypothecated goods only on account of negligence of the bank and its officers. The Tribunal therefore, found that the respondents herein cannot be held liable to repay the loan." In paragraph No.12 the aforesaid findings have been reiterated in the following terms :

"12. Having heard the learned Advocates appearing for the parties, it may be noted that the Cooperative Tribunal in its judgment dated 22nd July, 1997 had come to definite finding of fact that the bank officers were utterly negligent which had occasioned siphoning away of hypothecated goods. Being a finding of fact, its correctness shall have to be judged within a narrow compass since this Court is exercising powers under writ jurisdiction. xxx xxx"

12.2. In the case of *Union Bank of India, Bombay Vs. Suresh Bhaila Mehta* (supra) in paragraph No.20 of the judgment the Court has recorded "*the trial court has found that on account of the negligence of the plaintiff bank and the lengthy*

inaction on its part, the security in the form of hypothecated goods has been lost or diminished, and therefore, the same would discharge the second defendant from his obligations and liabilities as a surety". Further down in the said paragraph the Court records after referring to the deposition of second defendant : "*Even this assertion of the second defendant has not been successfully challenged in his cross-examination by the plaintiff bank"*. Once more in the same paragraph the Court reiterates : "*The allegation of the second defendant that this result has been brought about on account of the negligence and inaction on the part of the plaintiff bank , must be held to have been established from the material on record"*.

13 Thus, it is apparent that in both the cited cases, though the goods were hypothecated goods, the sureties were discharged as there were categorical findings of facts recorded by the Subordinate Court that : [i] there was loss of goods, and [ii] such loss had been occasioned due to negligence of the bank. Applying the aforesaid decisions to the facts of the present case, not only is there no finding as to the loss having been occasioned by the negligence of the bank, but the deposition of the bank official states otherwise. As

recorded by this Court in the case of *Union Bank of India, Bombay Vs. Suresh Bhailal Mehta* (supra) this is not a case where the defendant has led any evidence. To the contrary, as recorded hereinbefore, the defendant had not taken any steps in furtherance of the pleadings and their right to lead evidence had been closed by the Board of Nominees after having granted reasonable opportunities.

14. In the aforesaid set of facts and circumstances of the case, the petitions do not deserve acceptance and are accordingly rejected. On behalf of the petitioners a plea was raised that the principal borrower has been discharging the liability in instalments and that the property of the principal borrower is sufficient to take care of the outstanding dues of the respondent bank and hence, a direction may be issued to the respondent bank not to proceed to effect recovery against the petitioners.

15. It will be open to the petitioners, if they so desire, to approach the respondent bank and place the necessary facts for the consideration of the bank. However, the Court cannot issue any such direction in these petitions.

16. In the result, Special Civil Application No. 1836 of 2005 is rejected. Rule discharged. Special Civil Application No. 16432 of 2007 is also rejected. There shall be no order as to costs. Registry to place copy of this judgment in cognate matter.

Sd/-
(D.A. Mehta, J.)

m.m.bhatt